

Councillors & Social Media

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Case Note: Office of Local Government v Shelley [2018] NSWCATOD

In the recent decision Office of Local Government v Shelley [2018] NSWCATOD 103, the NSW Civil and Administrative Tribunal ('Tribunal') held that a councillor of Mid-Western Regional Council had committed misconduct within the meaning of s 440F(1)(b) of the Local Government Act 1993 ('LG Act') in that he breached Council's adopted Code of Conduct when he gave a speech at an ordinary meeting of Council and subsequently posted the speech on a Facebook page he administers.

In his speech on 1 June 2016, the councillor claimed that three of his fellow councillors had:

"perverted and influenced the recommendations to Council which would give them significant financial gain as all 3 have significant land holdings"

However, in his speech he did not explicitly state that the councillors had breached Council's Code of Conduct, but stated:

"I will leave it up to outside agencies to decide whether this undeclared significant pecuniary interest and actions by these 3 councillors is found to be corrupt or not"

The councillor's Facebook post on 2 June 2016 contained his speech from the Council meeting. Relevant to the matter was the Facebook disclaimer he had on the account:

"Admin of this face book page is Peter Shelley who as well as a resident in Rylstone has been an elected councillor since the inception of the Mid-Western Regional Council.

All views expressed are my own and not that of Mid-Western Regional Council nor any organisation or company. Views are personal and as a rate payer, not in any official capacity or otherwise as a councillor, an employee of any company or member of any organisation."

Two complaints were lodged with the Office of Local Government ('OLG') over the councillor's conduct at the Council meeting and the subsequent Facebook post. The OLG prepared a report in relation to the complaints and found that the councillor had breached clause 8.12 of Council's Code of Conduct at the Council meeting and in the Facebook post.

At the time of the complaint, Clause 8.12 of Council's Code of Conduct stated:

"You must not make allegations of suspected breaches of this code at council meetings or in public forums"

The OLG referred the matter to the Tribunal for determination regarding the social media posting as OLG considered the use of social media in this manner was without precedent.

In finding that the councillor had breached clause 8.12 as well as other clauses of the Code of Conduct the Tribunal held

that it is not necessary for a councillor who makes allegations of suspected breaches of the Code of Conduct to state explicitly that the conduct is breaching the Code of Conduct. The Tribunal stated that if this was the case, that this could lead to a situation where:

“...a councillor could avoid making an allegation that another councillor breached the Code simply by avoiding use of the words to the effect “...in breach of clause X of the Code” when describing the conduct complained of”

The Tribunal held that:

“when Clr Shelley’s words are read as a whole, it is clear, and I find, that he was alleging that Clrs Webb, Thompson and Martens had engaged in inappropriate or unethical conduct (cl 3.1(c)) of the Code.”

The Tribunal also held that the disclaimer on the Facebook page did not cover the content of the councillor’s post. The Principal Member held:

“The Facebook Post was inextricably linked to Clr Shelley’s work as a councillor, and the carrying out his functions as a councillor. This is obvious by the very nature of the publication, which a posting of the very speech, virtually verbatim, that he made in the Council chamber the day before. I find therefore Clr Shelley was carrying out his functions as a Council official when he published the Facebook Post on 2 June 2016. I reject his submission that the making of the disclaimer:

[a]ll views ... are personal and as a rate payer, not in any official capacity or otherwise as a Councillor

somehow detracts from that statement being characterized, in substance, as that of Clr Shelley in his capacity as a councillor.”

The OLG sought an order that the councillor be suspended from civic office or, in the alternative, that his right to payment be suspended, or that he be reprimanded.

The Tribunal held that the councillor should be reprimanded for the breach of Council’s Code of Conduct. In reaching the decision, the Principal Member took into account a number of considerations including that the councillor sought advice from Council’s General Manager and Mayor prior to delivering his speech at the ordinary meeting of Council, stating:

“it does demonstrate he was aware of any potential issues and sought some advice about it and how it avoid issues which might arise;”

The Tribunal also took into account that the councillor had no previous complaints of misconduct and was a man of considerable integrity. However, the Tribunal considered that as he was an experienced councillor, he should have been aware of the Code of Conduct and must “abide by its spirit and letter”.

This decision shows that it is important that a councillor knows of and adheres to the Council’s adopted Code of Conduct at all times when conducting their work and functions as a councillor. It is especially important that a councillor be aware that any accusation against another councillor breaching the Code of Conduct, either in a speech given to Council or in a social media post, can be taken from words read as a whole. It does not require the accuser to state a breach of a particular clause of the Code of Conduct has occurred.

This decision also importantly shows that a disclaimer on a social media post suggesting that the posting is not in a councillor’s official capacity will not be effective if the posting is inherently linked to the councillor’s work as a councillor including carrying out functions as a councillor.

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